Filed 1/14/19 In re F.G. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re F.G., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. F.G., Defendant and Appellant.	F076263 (Super. Ct. No. 514410) **OPINION**

THE COURT[*]

APPEAL from an order of the Superior Court of Stanislaus County. Rubén A. Villalobos, Judge.

Renée Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Ivan P. Marrs, Lewis A. Martinez and Louis M. Vasquez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Hill, P.J., Poochigian, J. and Smith, J.

Appellant F.G., a minor, appeals from the juvenile court's dispositional order declaring him a ward of the court. Following a contested hearing on a petition filed under Welfare and Institutions Code section 602, appellant was found to have committed the crimes of theft and unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a))[1] and knowingly obtaining, concealing, selling or withholding from the owner, a vehicle known to be stolen (Pen. Code, § 496d(a)). Appellant alleges several alternative forms of error, which initially turn on whether appellant was found to have stolen a vehicle or unlawfully driven a vehicle under section 10851. Depending on the outcome of that position, appellant contends either that the finding he obtained a stolen vehicle must be dismissed and his theft offense reduced to a misdemeanor or that both of his offenses must be reduced to misdemeanors under Proposition 47. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 18, 2017, at around 8:25 p.m., Modesto Police Officer Michael Rokaitis saw a white Honda Accord driving along a driveway next to the King-Kennedy Center at Mellis Park. This was odd to Officer Rokaitis because there were no events going on that evening and the driveway in question was more of a service route than a normal road. Officer Rokaitis drove toward the vehicle to investigate and noticed the driver was a Hispanic male with dark wavy hair, identified later as appellant. Officer Rokaitis noticed several others in the car, including a Hispanic woman with a ponytail.

Officer Rokaitis ran the vehicle's license plate number and learned the vehicle had been reported stolen. That report had been made around 8:00 a.m. that morning by the owner of the vehicle. Officer Rokaitis pursued the car for a period, during which he lost sight of the vehicle, before coming across the vehicle abandoned near the park. When he located the vehicle, Officer Rokaitis also saw a group of juveniles, including appellant,

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[1] All further statutory references are to the Vehicle Code unless otherwise indicated.

running into the park. Officer Rokaitis pursued appellant while in his patrol vehicle. He ultimately apprehended him after turning on his lights and siren, leading appellant to cease running. According to the officer, appellant claimed he was merely walking home and only ran because he saw the police. Upon further inspection, the vehicle was found to be running but without a key in the ignition.

Based on this incident, the People filed a wardship petition alleging appellant had committed two offenses. The first alleged "a Felony, AUTO THEFT, [a] violation of Section 10851(a) of the California Vehicle Code, in that the minor did willfully, unlawfully, and feloniously drive and take a certain vehicle, to wit, an automobile, to wit, a **WHITE 1995 HONDA ACCORD**, then and there the personal property of another without the consent of and with intent to deprive the said owner of title to and possession of said vehicle." The second alleged "a Felony, RECEIVING STOLEN VEHICLE, [a] violation of Section 496d(a) of the California Penal Code."

At appellant's arraignment, the parties discussed with the court the total potential confinement appellant faced, considering he was already on probation for a prior offense. At that time, the People stated appellant's total confinement time "would also be 38 months. Count II is charged in the alternative."

At the conclusion of appellant's later jurisdictional hearing, the People presented their closing arguments. At that time, they focused heavily on the fact the car was stolen and that appellant was the driver. Appellant's counsel argued generally that the evidence did not show appellant was in the vehicle and, specifically, that "the People have [not] proven beyond a reasonable doubt that it was [appellant] driving or in the car." The court rejected this position and found "beyond a reasonable doubt that [appellant] has committed both the offense in Count I and the offense in Count II, specifically auto theft, in violation of 10851(a) of the California Vehicle Code, and Count II, receiving a stolen vehicle, in violation of 496D(a) of the California Penal Code." It put off, until disposition, whether these offenses would be misdemeanors or felonies.

At the subsequent dispositional hearing the court initially considered a dispute about the maximum confinement time, which had been calculated as either 44 or 52 months. The court stated: "On the petition we have eight months for Count I. Zero for Count II. And 36 for previous petitions for a total of 44 months. [¶] It was one car. I think it's 654. I think that's probably why." In response, the People affirmed, "Right. They were charged in the alternative. So, yeah." In further discussions, the People argued for more time in juvenile hall than recommended, arguing "I don't think this minor really has an appreciation for the fact that stealing cars is not a game." While the court ultimately rejected this request, it did determine that both convictions would proceed as felonies in part because the court saw an escalation in appellant's behavior. On this point, the court stated, "We see how these things sometimes work. And, you know, it used to be that auto theft was called joyriding. And joyriding sounds like something silly, something that just kids do without thinking about it. [¶] We've seen how this type of behavior escalates into much more serious behavior. . . . And frankly that's concerning to the Court."

The court ultimately declared appellant a ward of the court and ordered him to serve 83 days in juvenile hall, with credit for 83 days served. This appeal timely followed.

DISCUSSION

This appeal consists of a nested set of contentions turning on an initial determination as to whether appellant's offense under section 10851 must be considered a theft offense. If so, appellant raises issues related to prohibitions on dual convictions and requests reduction of his crime pursuant to Proposition 47. If not, appellant partially concedes he can be properly found to have committed both offenses but argues his receiving property conviction must be reduced to a misdemeanor under Proposition 47. He further contends that equal protection concerns require both offenses to be treated as

misdemeanors under Proposition 47. We therefore begin by considering the nature of appellant's offense under section 10851.

The Court's Ruling Can Properly Stand Under a Driving Offense Theory

Section 10851 has long been recognized as a difficult statute to administer, containing two distinct offenses covering both vehicle theft and the concept of joyriding. Due to the need to classify the nature of one's conviction under section 10851 under other statutory provisions, a large body of case law has developed regarding how to understand such convictions. Briefly, these convictions can be viewed as either theft offenses or driving offenses. Relying mostly on statements by the People and the juvenile court, appellant argues his conviction must be viewed as a theft offense because the People charged him with theft of a vehicle and receiving a stolen vehicle in the alternative, a step only required in the context of theft offenses. Although the People did state the offenses were charged in the alternative, the case law shows that what matters is whether the evidence compels a finding the fact finder convicted on a theft offense theory. Here, the evidence presented to the juvenile court—the fact finder in this instance—was nearly wholly dedicated to a driving offense theory and the trial court's statements during disposition reveal it understood the offense to be like joyriding. Accordingly, we do not agree with appellant's claim he was convicted of a theft offense.

Standard of Review and Applicable Law

Under our Supreme Court's precedence, when "the evidence is such that it is not reasonably probable that a properly instructed jury would have found that the defendant took the vehicle but did not engage in any posttheft driving, a reviewing court may construe the Vehicle Code section 10851(a) conviction as a conviction for posttheft driving and on this basis may uphold the conviction … for receiving the same vehicle as stolen property." (*People v. Garza* (2005) 35 Cal.4th 866, 872 (*Garza*).)

The history behind the current rule is well summarized in *Garza*. (*Garza*, *supra*, 35 Cal.4th at pp. 876–878.) However, for our purposes, it can be further summarized

with respect to determining the nature of the Vehicle Code conviction as follows. In *People v. Jaramillo* (1976) 16 Cal.3d 752, 754–755, the court faced a situation where the defendant was found in a stolen car and circumstantial evidence suggested he both stole the vehicle and drove it. The court conceded there was no way to determine the basis by which the defendant was convicted under section 10851, particularly because the jury had been instructed to convict under section 10851 when it believed appellant had also committed grand theft auto but possessed a reasonable doubt as to which offense actually occurred. (*Jaramillo, supra,* at pp. 757–758.) In this context, the court concluded a receiving stolen property conviction could only stand when the "conviction of the Vehicle Code section is predicated on conduct not constituting a theft of the vehicle involved." (*Id.* at p. 754.) The court found the receiving stolen property conviction in *Jaramillo* improper under this logic because the record did "not disclose or suggest what specific findings were made in convicting [the] defendant of a violation of Vehicle Code section 10851 but it nevertheless appear[ed] that the fact finder may have found that the defendant intended to steal the vehicle." (*Id.* at p. 759, italics omitted.)

The Courts of Appeal eventually began distinguishing *Jaramillo*. Thus, in *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252, the court found dual convictions were permissible where the evidence could not support a theft offense and the prosecutor had expressly disavowed that theory during trial and argued the defendant was guilty of a driving offense. Taking the line further, in *People v. Strong* (1994) 30 Cal.App.4th 366, 376, the evidence could support either a driving or theft offense conviction, although the theft evidence was less conclusive. There, although the court found error when the jury was not instructed on the *Jaramillo* principles, it concluded the error was harmless where the evidence showed a substantial break between the theft and any driving such that no reasonable jury could have found appellant was not guilty of a driving offense in part because one is not convicted of theft if "the evidence show[s] two distinct violations of section 10851." (*Strong, supra*, 30 Cal.App.4th at pp. 373–374, 376.)

Following these cases, the Supreme Court again considered the dual conviction prohibition in *Garza*. Although it did not disavow its prior analysis in *Jaramillo*, the *Garza* court affirmed the analyses in *Austell*, *Strong*, and similar cases, explaining "a defendant who steals a vehicle and then continues to drive it after the theft is complete commits separate and distinct violations of section 10851(a)." (*Garza, supra*, 35 Cal.4th at pp. 880–881.) The court distinguished the result in *Jaramillo* by noting that case had been considered under a different harmless error standard that was utilized before certain legislative amendments codifying the narrow view of the common law prohibition against dual convictions were passed. (*Garza, supra*, 35 Cal.4th at p. 882.) It viewed the proper error analysis for vacating a receiving stolen property conviction to require a showing "that it is not reasonably probable that a properly instructed jury would have found defendant guilty of violating section 10851(a) by stealing the car but not by posttheft driving." (*Ibid*.)

In line with this view, this court recently noted, in a case where it appeared the instructions treated allegations under section 10851 exclusively as a taking offense, that alleged errors are viewed by "how the erroneous instruction affected the *jury*" and not by what the "*trial court* believed." (*People v. Calistro* (2017) 12 Cal.App.5th 387, 402 (*Calistro*).) In *Calistro*, we explained that the prosecutor could elect to pursue a driving theory by arguing that theory in closing and that overwhelming evidence of posttheft driving meant "no reasonable juror could have found that [the defendant] took the car *but did not drive it* after the theft was complete." (*Id.* at pp. 402–403.)

The Evidence Does Not Support Only Finding a Theft Offense Occurred

This case straddles the line between the various analyses in the cases noted above. On the one hand, the evidence presented strongly supports a conviction for posttheft driving while only inferentially supporting an actual theft conviction. In this vein, the prosecutor's contentions during closing arguments suggest a posttheft driving theory supporting the conviction under section 10851, even if there is some ambiguity. The

prosecutor heavily focused on the evidence showing appellant was driving the vehicle and only noted the evidence supporting the conclusion the vehicle was stolen to demonstrate the driver of such a vehicle would know it was stolen. At the end, however, the prosecutor did imply this was a theft case, reminding the court that there was only one set of keys for the car and that those were in the owner's possession at all times. This inference ties in with the conflicting evidence both that the prosecutor intended to, and did, pursue a theft theory and that the trial court convicted on this theory. Supporting this conclusion, the petition in this case alleged appellant "did commit a Felony, AUTO THEFT, [a] violation of Section 10851(a) of the California Vehicle Code."[2] Likewise, the prosecutor twice stated to the court that the charges under section 10851 were alternative charges to the Penal Code section 496d receiving a stolen vehicle charge, a position only necessary if the Vehicle Code charge is based on a theft theory. Finally, the juvenile court found, consistent with the phrasing of the petition, that appellant had committed "the offense in Count I . . ., specifically auto theft, in violation of 10851(a) of the California Vehicle Code."

Under these facts, we conclude appellant's dual convictions are proper. On appeal, we presume the judgment of the juvenile court is correct and that the court correctly understood and applied the law. (*Garza*, *supra*, 35 Cal.4th at p. 881; *People v. Nance* (1991) 1 Cal.App.4th 1453, 1456; accord *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913–914.) Appellant's arguments turn on whether we accept that the evidence compels the conclusion the parties and the court proceeded only on a theft-based theory for conviction under section 10851.[3] The petition, however, left open the possibility of a

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[2] Relevant to the contrary position, though, the petition vaguely asserts appellant did "feloniously drive and take" the vehicle with the "intent to deprive the said owner" of the vehicle. It does not distinguish, as the statute does, between a permanent or temporary intent to deprive.

[3] Notably, appellant does not argue a due process violation from any lack of disclosure that he could be convicted under a driving theory based on the wording of the petition. Nor does

driving theory even if generally suggesting a theft theory, the evidence presented was almost exclusively based on a driving theory, and the prosecutor argued a driving theory. Although the court identified the offense as auto theft in pronouncing its findings, it appeared to be parroting the general language of the petition and provided no clarification as to the theory it relied upon. Presuming the court was aware of and properly applying the prohibition of finding one guilty of a theft-based offense under the Vehicle Code and of receiving that same stolen property under the Penal Code, (*Jaramillo*, *supra*, 16 Cal.3d at p. 759), we do not find the court's statement demonstrates appellant was convicted based on a theft theory. We also note with respect to the court's view of the offense that the court appeared to equate appellant's conduct with joyriding, a driving offense, at the dispositional hearing, stating in its escalation discussion that "you know, it used to be that auto theft was called joyriding." Ultimately, in line with the relevant test for harmlessness, the evidence does not support finding appellant stole the car but did not commit a posttheft driving offense. If this were the case, the court would presumably not have reached its conclusion appellant committed both offenses.

We likewise reject appellant's contention that the evidence was not sufficient to demonstrate a break between any theft-related driving and the posttheft driving necessary for the juvenile court's determination. The evidence presented showed a nearly 12-hour break between the time the car was reported stolen and the time appellant was seen driving the vehicle. Further, the evidence showed the vehicle was first seen as it was being driven around a park with multiple occupants. This is sufficient to support the conclusion that the driving seen by the officer was not part of the original taking, no

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appellant argue the prosecutor and trial court were bound by the petition to only consider a taking theory. Rather, appellant argues the prosecutor and court proceeded as if asserting a taking theory and, as noted below, challenges the court's findings on the driving theory by arguing no evidence supports the required finding there was a substantial break between the theft and driving. Accordingly, we proceed accepting that, procedurally, appellant could be convicted under a driving theory in this case.

longer part of a continuous journey away from the theft or escape, or occurred after appellant had initially reached a place of temporary safety following the theft. (See *Calistro*, *supra*, 12 Cal.App.5th at p. 395 [discussing examples of demarcation point for posttheft driving].)

Having reached the above conclusions, we thus reject appellant's claim that he was improperly convicted of both theft of a vehicle and receiving that stolen vehicle. The law is well settled that the prohibition on multiple convictions does not arise when the conviction under section 10851 is for a driving offense and not a theft offense. (*Calistro*, *supra*, 12 Cal.App.5th at pp. 404–405.) We likewise reject appellant's claim that his section 10851 offense should be reduced to a misdemeanor under Proposition 47 for lack of evidence the vehicle was worth less than $950. This requirement does not apply to driving offenses. (See *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 856.)

Appellant's Remaining Positions

Based on our conclusion that appellant is properly seen as committing a driving offense under section 10851, we turn to appellant's remaining arguments based on that determination. Appellant argues his conviction under Penal Code section 496d is subject to Proposition 47 such that his offense must be classified as a misdemeanor unless there is evidence the vehicle at issue is worth more than $950. We do not agree. This issue has been considered and rejected by two of our sister courts, both finding that Proposition 47 does not affect Penal Code section 496d. (See *People v. Bussey* (2018) 24 Cal.App.5th 1056, 1062–1063 (*Bussey*); *People v. Varner* (2016) 3 Cal.App.5th 360, 365–367 (*Varner*).) We find these cases to be more persuasive than *People v. Williams* (2018) 23 Cal.App.5th 641, 651, and, absent further guidance from the Supreme Court, see no reason to depart from their analysis.

Appellant also argues that equal protection concerns require that both his section 10851 and his Penal Code section 496d offenses be reduced to misdemeanors under Proposition 47. More specifically, appellant contends that it is improper to treat

those who steal vehicles and those who receive general stolen property less harshly than those that drive vehicles or receive a stolen vehicle. We do not agree. As with appellant's first argument, these positions have been raised and rejected previously. With respect to section 10851, this court has previously found no equal protection violation. (See *People v. Sauceda* (2016) 3 Cal.App.5th 635, 651–654, disapproved on other grounds by *People v. Page* (2017) 3 Cal.5th 1175, 1187, fn. 4.) And our sister courts deciding the Proposition 47 issues with respect to Penal Code section 496d also rejected equal protection claims. (*Bussey, supra,* 24 Cal.App.5th at pp. 1063–1064; *Varner, supra,* 3 Cal.App.5th 360, 367–370.) Absent further guidance from the Supreme Court, we see no reason to depart from these analyses.

DISPOSITION

The order of the juvenile court is affirmed.